Supreme Court, U.S.
FILED
APR 4 1997
OFFICE OF THE CLERK

No. 96-1354

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

ROBERT S. CATZ,

Petitioner,

v.

TRIAL COMMISSIONER JOSEPH R. McDONALD, DOMESTIC RELATIONS DIVISION OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIMA, ARIZONA, SUSAN R. CHALKER (Real Party of Interest), FIDELITY INVESTMENTS, TEACHERS INSURANCE ANNUITY ASSOCIATION-COLLEGE RETIREMENT EQUITY FUND, AND WATERHOUSE SECURITIES, INC.

Respondents.

Petition for Writ of Certiorari to the Arizona Court of Appeals, Division Two

---

PETITIONER'S REPLY MEMORANDUM

CHARLES R. RAY
JEFFERY S. FRENSLEY
211 Third Avenue North
Nashville, TN 37201
(615) 256-2111

JOHN E. HERBISON
Counsel of Record
2016 Eighth Avenue South
Nashville, TN 37204
(615) 297-5900

Counsel for Petitioner

PETITIONER'S REPLY MEMORANDUM

This petition raises important constitutional issues regarding the arbitrary and impermissible exercise of state judicial power and the fundamental and historical right to defend deeply rooted at common law and in the Due Process Clause of the 14th Amendment. That right undeniably includes the opportunity to defend before an impartial judicial officer. Ward v. Monroeville, 409 U.S. 57, 61-62(1972); In re Murchison, 349 U.S. 133 (1955); Tumey v. Ohio, 273 U.S. 510(1927).

On January 10, 1995 the chief judge of the Arizona divorce court re-assigned this case from himself to respondent trial commissioner McDonald. On March 14, 1995 respondent McDonald entered final judgment by default as a sanction for contempt without *any* prior notice to the petitioner.(App. 36-46) On May 5, 1995 respondent Chalker's divorce lawyer Leonard Karp filed an affidavit for an award of attorneys fees. The affidavit disclosed for the first time on the record of the divorce court proceedings that Mr. Karp had met privately with the chief judge of the domestic relations division on December 16, 1994, the very morning that the chief judge abruptly cancelled sua sponte the emergency hearing scheduled before respondent McDonald (R.106), and that counsel was serving as a judge pro tempore of the divorce court since 1985. (R.191)

If these belated disclosures were not enough, the Arizona divorce court record establishes that after reassignment of this case to respondent McDonald, neither of respondent Chalker's several divorce lawyers nor respondent trial commissioner McDonald *ever* dis-

closed to petitioner that immediately prior to assuming judicial office, respondent McDonald and respondent Chalker's counsel Leonard Karp were name partners in the Tucson, Arizona law firm of Karp, Stolkin,Weiss & McDonald, P.C. See, MARTINDALE-HUBBELL, Vol. I at page 526B (1988) (law firm biography).

In addition to the pervasive due process irregularities that occurred in the Arizona proceedings as fully developed in our petition, on January 16, 1996 respondent McDonald awarded respondent Chalker's divorce lawyers $43,308.93 in attorneys fees. The fees were awarded to two law firms for work performed in a case that resulted in the "prompt" and "expeditious" entry of a default judgment in which pro se petitioner was denied any and all opportunity to be heard and to offer any kind of significant resistance to "draconian" litigation tactics designed not in furtherance of the truth but to marginalize an adversary premptively and unconstitutionally stripped of all his financial resources, and those of his non-party adult children, resources necessary to mount any kind of meaningful defense.

From these facts, a detached and neutral observer could reasonably infer, given the totality of the record of the"shocking" and "draconian"(App. 12) Arizona divorce proceedings, that petitioner was denied a full and fair opportunity to be heard before an impartial and neutral tribunal, one which would allow him some momentary opportunity to defend before final adjudication of fraud allegations. The odious finding of fraud clearly unsupported by any syntilla of clear and convincing

evidence, the standard of proof that must be applied even in a summary proceeding under the law of the rendering State of Ohio required by Article IV § 1 that petitioner engaged in fraud in the Ohio divorce proceedings (App. 42), while an officer of the Supreme Court of Ohio and this Court, was entered by respondent McDonald without the slightest consideration given to the attendant collateral consequences of a adjudication by default that petitioner was guilty of conduct unbecoming a member of the bar violates due process. See, Sup.Ct. Rule 8.1-8.2

The Court has consistently held "that the right to an impartial decision-maker is required by due process in every case." Arnett v. Kennedy, 416 U.S. 134, 197 (1974). Indeed, the "appearance of even handed justice . . . is at the core of due process." Mayberry v. Pennsylvania, 400 U.S. 455, 469(1971). And, due process requires recusal of decision-makers who may" have no actual bias," if they might reasonably appear to be biased." Morrisey v. Brewer, 408 U.S. 471, 485 (1972); Goldberg v. Kelley, 397 U.S. 254, 271(1971).

The right to fair and impartial court proceedings is fundamental to litigants; fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside. "Justice must satisfy the appearance of justice." In re Murchison, 349 U.S. at 136. Here, no disclosure was made to petitioner by Mr. Karp, a judge pro tempore of the divorce court, nor by respondent McDonald that they had been law partners. The courts have repeatedly

placed great importance on an impartial judiciary: "[o]ne of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of bias or prejudice in the trial of the case." United States v. Wade, 931 F.2d 300, 304(5th Cir. 1976). In Liljeberg v. Health Services Acquisition Co., 486 U.S. 847, 860-61(1988) the Court stated the standard for disqualification of a judge is "whether a reasonable and objective person, knowing all the facts, would harbor doubts concerning the judge's impartiality." (Emphasis added) "Knowing all the facts" is vital when assessing whether disqualification should be sought. And disqualification for lack of impartiality can only be fairly assessed by a party-litigant when full disclosure is made on the record regarding a judge's past and present professional, familial, business affliations and personal relationships with the parties and those members of the bar that regularly appear before the divorce court.

Contrary to the respondent's assertion in her opposition, the extreme and "shocking" due process departure from established modes of procedure by the Arizona divorce court was argued extensively to the Arizona Court of Appeals and the Arizona Supreme Court where petitioner unambigously sought special action mandamus relief from the judgment in order to restore the rule of law "spoken with the voice of the Due Process Clause of the 14th Amendment" to enforce unambigous "rights protected in a long line of unbroken

cases decided by the Court in Sniadach v. Family Finance , 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant, 416 U.S. 600 (1974); North Georgia Finance Co. v. Di-Chem, 419 U.S. 922 (1975)." (R. 23-24)

Finally, the larger due process question presented here subsumes claims under Article IV § 1 as the Arizona divorce court in the default judgment evidentiary hearing improperly declined to give the 1989 Ohio divorce decree full faith and credit under Article IV § 1 by failing to apply the evidentiary standard of proof required by the law of the rendering state of Ohio whenever a party collaterally attacks a prior judgment on grounds of fraud, nor did the Arizona divorce court in rendering final judgment by default ever examine or receive into evidence an authenticated copy of the record of Ohio proceedings as required by 28 U.S.C. § 1738. On March 24, 1997 the Court granted certiorari in Baker v. General Motors Co. No. 96-653 to consider the propriety of a federal court sitting in diversity declining to give a Michigan decree full faith and credit on Missouri state policy grounds. In light of this development, the Court may deem it appropriate to defer consideration of this petition until a decision in Baker.

Respectfully submitted,

Charles R. Ray
Jeffery S. Frensley
211 Third Avenue North
Nashville, TN 37203
(615) 256-2111

John E. Herbison
Counsel of Record
2016 Eighth Avenue South
Nashville, TN 37204
(615) 297-5900